



700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
PHONE: 202.654.6200
FAX: 202.654.6211
www.perkinscoie.com

Brian G. Svoboda
Lauren T. Mehta
PHONE: (202) 434-1654
FAX: (202) 434-1690
EMAIL: BSvoboda@perkinscoie.com
L.Tribble@perkinscoie.com

June 29, 2012

BY HAND

Jeff S. Jordan, Esq.
Supervisory Attorney
Complaints Examination & Legal Administration
Federal Election Commission
999 E Street N.W.
Washington, D.C. 20463

Re: Matter Under Review 6570

Dear Mr. Jordan:

On behalf of Berman for Congress and Bruce Corwin, as treasurer (collectively, "the Committee"), we submit this letter in response to the Complaint filed by Scott Abrams dated May 3, 2012. The Complaint falsely asserts that the Committee accepted excessive in-kind contributions through slate mail paid for by the Committee to Elect an Effective Valley Congressman ("CEEVC"). It asks the Commission to find reason to believe that the Committee violated the Federal Election Campaign Act, as amended ("the Act").¹

The Complaint presents no violation. It fails to allege any request, suggestion or assent, substantial discussion, or material involvement on the part of Representative Berman, the Committee, or their agents. It fails also to allege the elements necessary to establish coordination through use of a common vendor or former Committee independent contractor. It specifically fails to allege that any information about Representative Berman's plans, projects, activities or needs, or any information that had been used in providing services to the Committee, was used in the slate mail. And it ignores the fact that, even if such information had been used, the Committee still would not have received a contribution.

¹ 2 U.S.C. § 431 *et seq.*

73655-0001/LEGAL/24012794.2

ANCHORAGE • BEIJING • BELLEVUE • BOISE • CHICAGO • DALLAS • DENVER • LOS ANGELES • MADISON • NEW YORK
PALO ALTO • PHOENIX • PORTLAND • SAN DIEGO • SAN FRANCISCO • SEATTLE • SHANGHAI • WASHINGTON, D.C.

Perkins Coie LLP

2012 JUN 29 AM 8:58
CELA
RECEIVED
FEDERAL ELECTION
COMMISSION

1204323079

Because the Complaint fails to allege a violation, the Commission should find no reason to believe that the Committee violated the Act.

FACTUAL BACKGROUND

Berman for Congress is the principal campaign committee of Representative Howard Berman, a Member of Congress seeking reelection in 2012. The Complaint is dated May 3; Representative Berman has since been nominated to run in the November 6 general election.

In or around November 2011, the Committee engaged Jerry Seedborg and his political consulting firm, Seedborg Campaigns, to administer its day-to-day operations. Both Mr. Seedborg and Seedborg Campaigns were hired as independent contractors. As the Complaint indicates, the Committee made payments from December 27, 2011 to March 20, 2012 to Mr. Seedborg and Seedborg Campaigns. However, Mr. Seedborg and Seedborg Campaigns stopped providing services to the Committee in early March, when the parties negotiated the terms of a mutual separation. Neither Mr. Seedborg nor Seedborg Campaigns has had any further involvement in Representative Berman's campaign.

The Complaint alleges that another company associated with Mr. Seedborg – Voter Guide Slate Cards ("VGSC") – was engaged by CEEVC to place an advertisement supporting Representative Berman in its slate mail. It alleges that Mr. Seedborg is VGSC's founder and principal, and that the company shares an address and phone number with Seedborg Campaigns. But VGSC has not served as a vendor to the Committee during the 2012 election cycle. Nor did the Committee have any contacts with VGSC, CEEVC or Mr. Seedborg about the slate mail. It did not request, suggest or assent to the slate mail, was not involved in any decision about it, and knows of no instance in which nonpublic information about its plans, projects, activities or needs would have been conveyed.

LEGAL ANALYSIS

The Complaint fails to allege a violation. It relies entirely on the fact that CEEVC purchased space in slate mail distributed by VGSC, which in turn was associated with Mr. Seedborg. But the Complaint presents none of the conduct necessary for a coordinated communication.² Moreover, it fails to mention that, even if VGSC met the conduct standards for using a common vendor or former independent contractor, and even if Committee-derived information was used in preparing and distributing the slate mail, the Committee still would not have received a contribution.

² See 11 C.F.R. § 109.21(d)(1)-(5) (2012).

I. The Complaint Alleges No Coordinated Communication.

Under the Act, a communication is considered coordinated if it is paid for "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents".³ Commission rules implement this statute with a three-pronged test. A communication is coordinated if: (1) it is paid for by a person other than the candidate or his authorized committee; (2) it meets any of four "content standards" set forth in 11 C.F.R. § 109.21(c); and (3) it meets any of five "conduct standards" set forth in 11 C.F.R. § 109.21(d).⁴

The first three conduct standards require some form of communication by the candidate or his campaign to the person paying for the communication.⁵ These standards are satisfied where:

1. The communication is created, produced, or distributed at the request or suggestion, or with the assent of the candidate or his committee;⁶
2. The candidate or his committee is materially involved in decisions about the communication's content, intended audience, means, mode, choice of media outlet, timing, frequency, size, or prominence;⁷ or
3. The communication is created, produced, or distributed after one or more substantial discussions between the person paying for the communication and the candidate identified in the communication or his committee, in which material information about the candidate's plans, projects, activities or needs is conveyed to the payor.⁸

The remaining two conduct standards are satisfied where:

4. The payor or its agent hires a commercial vendor whose owner, officer or employee has provided certain enumerated services to the candidate or his committee during the previous 120 days;⁹ or
5. The payor or its employee was an employee or independent contractor to the candidate or his committee during the previous 120 days.¹⁰

³ *Id.* § 441a(a)(7)(B)(i).

⁴ 11 C.F.R. § 109.21(a)(1)-(3).

⁵ *Id.* § 109.21(d)(1)-(3).

⁶ *Id.* § 109.21(d)(1).

⁷ *Id.* § 109.21(d)(2).

⁸ *Id.* § 109.21(d)(3).

⁹ *Id.* § 109.21(d)(4).

12044323081

In these last two cases, the conduct standard is satisfied only if nonpublic material information about the candidate's plans, projects, activities, or needs is used or conveyed in creating, producing, or distributing the communication.¹¹

The Complaint alleges no request, suggestion or assent by the Committee or its agents. Nor does it allege any substantial discussion or material involvement on their part that would have been material to the slate mail. It alleges no direct contact between the Committee, and VGSC or CEEVC, at all. Indeed, the Complaint does not provide even the most basic information that would allow the Commission to find potential coordination: what the mailer said, when it was sent, and who received it.¹²

Instead, the Complaint relies on innuendo. It notes that VGSC's web site contained an endorsement by the Representative's brother, who is a prominent California political consultant.¹³ It identifies the payments made by the Committee to Mr. Seedborg and Seedborg Campaigns, but none from the Committee to VGSC.¹⁴ It cites CEEVC's debt to VGSC, which was reported after the Committee's separation from Mr. Seedborg and Seedborg Campaigns.¹⁵ But it shows no transfer of nonpublic information from the Committee to VGSC or CEEVC. It fails to present the conduct necessary for coordination under the request or suggestion, substantial discussion, or material involvement standards.

The Complaint hinges, then, on whether the slate mail meets the common vendor or former independent contractor conduct standards for coordination. But to meet these standards, the Complaint must allege that material nonpublic information about the Representative Berman's plans, projects, activities, or needs was used or conveyed when the slate mail was created, produced or distributed.¹⁶

But rather than produce any evidence that Mr. Seedborg, Seedborg Campaigns, VGSC or CEEVC used or conveyed material nonpublic information, the Complaint speculates that "[w]hile a consultant for Berman for Congress, Mr. Seedborg [was] undoubtedly . . . exposed to . . . 'campaign plans, projects, activities, or needs'" and that he somehow must have used it while

¹⁰ *Id.* § 109.21(d)(5).

¹¹ *Id.* §§ 109.21(d)(4)(iii), (d)(5)(ii).

¹² See 11 C.F.R. §§ 109.21(a)(2), 109.21(c).

¹³ Complaint at 1.

¹⁴ *Id.* at 2.

¹⁵ *Id.* at 2.

¹⁶ See 11 C.F.R. §§ 109.21(d)(4)(iii), (d)(5)(ii).

preparing the slate mail. Under Commission precedent, such "asserted facts" and "mere speculation will not be accepted as true, and provide no independent basis for investigation."¹⁷

The Complaint alleges that the shared use of a vendor presents "the most clearly documented case ever put before the FEC..." But the Commission has repeatedly and expressly said just the opposite - that "it does not presume coordination from the mere presence of a common vendor."¹⁸ Moreover, the nature of slate mail in California makes it unlikely that the mail would have been affected by information about campaign plans, projects, activities or needs. Slate mail is a for-profit business. Sponsors typically give purchasers complete control over the content printed, like a newspaper selling classified ads. Moreover, because the sponsors sell space to multiple purchasers, they generally choose the audience and timing of the mailer before making space available.

Thus, the Complaint presents none of the elements necessary for coordination. It alleges no contacts whatsoever between Representative Berman, the Committee or its agents with VGSC or CEEVC about the slate mail. Nor does it provide any facts that would allow the Commission to believe that Committee information was conveyed to or used by VGSC or CEEVC in preparing or distributing slate mail. Indeed, the Complaint does not even allege what the mail said, where it was sent, or when it was sent. The Commission should find no reason to believe that any coordinated communication occurred.

II. Even If There Were a Coordinated Communication, the Committee Still Would Not Have Received a Contribution.

The Commission's regulations distinguish between coordinated contributions that are made on behalf of a campaign, and those that a campaign actually receives and accepts. The Complaint fails to mention a specific Commission rule which provides that

the candidate, authorized committee, or political party committee with whom a communication is coordinated does not receive or accept an in-kind contribution . . . that results from [the common vendor conduct standard] or the [former independent contractor standard], unless the candidate, authorized committee, or political party committee engages in conduct described in paragraphs (d)(1) through (d)(3) of this section.¹⁹

Put simply, a campaign does not receive or accept an in-kind contribution as a result of a coordinated communication, unless it (1) requests, suggests the communication; (2) is materially

¹⁷ Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001).

¹⁸ Federal Election Comm'n, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 437 (Jan. 3, 2003).

¹⁹ 11 C.F.R. § 109.21(b)(2).

Jeff S. Jordan, Esq.
June 29, 2012
Page 6

involved in decisions about the communication; or (3) has one or more substantial discussions about the communication before the communication is created, produced, or distributed.²⁰

Thus, even if VGSC met the common vendor standard, or even if Mr. Seedborg met the former independent contractor standard – which they do not, given the nature of their relationships, and the absence of any credible allegation that they used nonpublic campaign information in preparing, producing or distributing slate mail – there would still be no basis to find reason to believe that the Committee accepted any contribution.

For the reasons set forth above, this complaint is wholly without merit. We respectfully request the Commission to find no reason to believe that a violation occurred, and to dismiss this matter.

Very truly yours,



Brian G. Svoboda
Lauren T. Mehta

²⁰ See *id.* §§ 109.21(b)(2), (d)(1)–(3).